THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERNADEAN RITTMANN, *et al.*, Plaintiffs, v. AMAZON, INC., *et al.*, Defendants.	CASE NO. C16-1554-JCC ORDER

This matter comes before the Court on Defendants' motion to certify an order for interlocutory appeal (Dkt. No. 391). Having thoroughly considered the briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

The facts of this case are well-documented elsewhere and the Court will not repeat them. (*See, e.g.,* Dkt. No. 338 at 1–2.) Plaintiff delivery drivers sued Defendants in a putative class action on various grounds, including the Fair Labor Standards Act ("FLSA"). (Dkt. No. 262 at 30.) The FLSA permits a court to conditionally certify an opt-in class, which may trigger notice to prospective members. 29 U.S.C. § 216(b); *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989). This Court granted conditional certification. (*See* Dkt. No. 381 at 2–7) (citing *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1112–13 (9th Cir. 2018)). Pursuant to that decision, the parties were ordered to confer on a sufficiently conditional class notice that is

neutral and clear to prospective class members. (*Id.* at 12.)

Defendants now ask the Court to certify its conditional certification order for interlocutory review. (*See generally* Dkt. No. 391.) Although Defendants do not challenge certification generally, they submit that there are two issues with the scope of the class appropriate for review: (1) whether Plaintiffs' FLSA claims could be equitably tolled on a class-wide basis and (2) whether notice should issue to certain class members who have allegedly agreed to arbitration. (*Id.* at 9–14.) On the first issue, the Court found that the interests of justice weighed in favor of class-wide tolling because of an eight-year stay on Plaintiffs' original certification motion. (*See* Dkt. No. 381 at 9–10) (explaining that such an extraordinary litigation circumstance justifies tolling). Defendants, on the other hand, submit that equitable tolling requires individualized, fact-bound assessments. (Dkt. No. 391 at 9–10.) They observe that many potential class members have initiated arbitration elsewhere, thus they were not prevented from bringing their claims. (*Id.* at 10.)[1]

On the second issue, the Court followed the Ninth Circuit trend of conditional certification, in spite of arbitration clauses. (*See* Dkt. No. 381 at 8) (collecting cases and distinguishing *Geiger v. Charter Commc'ns Inc.*, 2019 WL 8105374 (C.D. Cal. 2019)). The Court reserved judgment on arbitration and observed that Defendants would have at least two more opportunities to litigate the issue: at its expected renewed motion to compel arbitration and the FLSA class decertification stage. (*Id.* at 9.) Defendants maintain this is an important question not yet answered in this circuit (but which has in others). (Dkt. No. 391 at 13.)

A district court may, in its discretion, certify an order for interlocutory appeal if (1) it involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); *see also Swint v. Chambers Cnty. Comm'n*,

[1] Plaintiffs' have stipulated to exclude from notice any class members already represented in arbitration. (*See* Dkt. No. 381 at 9 n.2.)

514 U.S. 35, 47 (1995) ("Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals"). Interlocutory appeals are approved only in rare circumstances because they are "a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." *James v. Price Stern Sloan, Inc*., 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). They are "not intended merely to provide review of difficult rulings in hard cases." *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). As the party moving for review, Defendants here have the burden of showing that all three elements are met. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (overruled on other grounds). They fail to do so.

As to the first element, Defendants have not shown that the conditional class certification order presents a controlling question of law (much less its scope). "Generally an order granting class action status does not involve a controlling question of law." *Blackie v. Barrack*, 524 F.2d 891, 898 n.13 (9th Cir. 1975). This is especially true of FLSA class certification because, unlike Rule 23 class certification, it is *conditional*. As explained in the Court's order, FLSA certification usually proceeds in two stages: conditional certification then decertification. (Dkt. No. 381 at 3.) The Court's conditional decision in the instant order may be altered at stage two. In addition, there are numerous other claims still to be litigated here besides those under the FLSA. (*See* Dkt. No. 338 at 7–18) (dismissing some claims but leaving others). Even assuming reasonable judges could differ on the issues here, what is presented is "nothing more than an uncertain question of law relevant to only [two] of several causes of action alleged below." *U.S. Rubber Co.*, 359 F.2d at 785. Therefore, it is not controlling in the relevant sense. *See Villareal v. Caremark LLC*, 85 F. Supp. 3d 1063, 1069 (D. Ariz. 2015) (citing cases and holding the same).

The third element for interlocutory review is "closely linked" to the first. *Id.* at 1071. For similar reasons to those stated above, the Court does not find an appeal of its conditional order would advance the termination of this litigation. Both the equitable tolling and arbitration issues could be mooted at the decertification stage. Interlocutory appeal could just as well delay the litigation here, especially in light of the remaining claims. *See id.* at 1073. Defendants would

only be correct that an appeal will advance the litigation if a raft of assumptions come to pass. *See id.* at 1071 n.5. That is not enough for this Court to certify the order.

To summarize, Defendants fail to show that at least two of three statutory factors are met to justify the exceptional relief they seek. Accordingly, their motion for certification for interlocutory appeal (Dkt. No. 391) is DENIED.

DATED this 29th day of January 2025.

John C. Coughenour
UNITED STATES DISTRICT JUDGE